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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 432

S. T. PERSEN as Ancillary Administrator *de bonis non* with the will annexed of Washington Gray, deceased,
Petitioner,

—against—

THE NATIONAL CITY COMPANY, a corporation, also known as The City Company of New York, Incorporated, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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THE COURT PRESS, N. Y. C.

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Petitioner,

—against—

THE NATIONAL CITY COMPANY, a corporation, also known as The City Company of New York, Incorporated, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, S. T. Persen as Ancillary Administrator de bonis non with the will annexed of Washington Gray, deceased, respectfully prays that a Writ of *Certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit reversing a judgment of the United States District Court for the Southern District of New York, entered March 16, 1942, in favor of the plaintiff (petitioner) and against the defendant (respondent) for the sum of $32,293.99.

All references are to page numbers in the Printed Record.

Opinions Below.

The opinion of the District Court (R. 225, 229) is not reported.

No opinion of the Circuit Court of Appeals was rendered, save as follows:

> "Per Curiam. Reversed on authority of *Robbins* v. *Pacific Eastern Steamship Company*, 8 Cal. (2d) 241, and complaint dismissed."

The decision of the Circuit Court of Appeals was rendered on July 6th, 1942, and the decree and order for the mandate thereon was entered July 28th, 1942.

Jurisdiction.

The Jurisdiction of this Court to review the decision of the Circuit Court of Appeals is invoked under Section 240 (a) of the Judicial Code, as amended (U. S. Code, Title 28, Section 347).

Question Presented.

Whether a purchaser in California of securities whose sale is subject to the Corporate Securities Act of that state is deprived of the protection of such Act because the purchaser, on paying the seller in California the purchase price, directs the seller to send the securities to seller's New York office for purchaser's safekeeping account, *i. e.* does such a direction (and its effectuation) constitute such a "delivery" of the securities outside California as to exempt the sale from such Act?

Statement.

The suit is to recover the purchase price of 50 shares of the capital stock of The National City Bank of New York and of The National City Company, or beneficial interest therein, under a sale of them made conjointly, *i. e.* the stock and beneficial interests in both corporations were printed on single certificates and were, by pre-existing agreement, linked together for public sale, holding and transfer in such manner as to require any purchaser of one necessarily to purchase the other. Under the California Corporate Securities Act (L. 1917, c. 532; R. 129, *et seq.*), the stock or beneficial interest therein of The National City Company of New York should have been registered in California for sale, but was not; and such a sale of an unregistered security is illegal and invalid. In making the sale The National City Company of New York used as its agent The National City Company of California, solely controlled by the New York Company, which owned all the stock of the California company (R. 95), with Charles E. Mitchell, the head of the New York company, as a director of the California company (R. 156). The purchaser, Washington Gray, was in California on a visit when he bought the securities there. He made there payment of the purchase price (R. 105). The notice of confirmation of sale was executed and delivered to him in California with advice that "disposition will be made in accordance with your instructions" (R. 104). Accordingly, Gray, in making payment in California, directed that the same be "delivered to *your New York office* for my account for safe keeping" (R. 105; emphasis supplied) and confirmed this direction on a form of the seller, when he filled in the blank, after the printed clause reading: "When certificates are ready, kindly forward to", with the words "National City Com-

pany (*Head Office*), New York City, for safe keeping & subject to my order" (R. 106; emphasis supplied). The plaintiff was appointed administrator d.b.n. c.t.a. of Gray after the latter's estate had been administered by his executor and this claim was discovered. The Circuit Court of Appeals reversed the verdict in the District Court for plaintiff and dismissed the complaint solely "on authority of *Robbins* v. *Pacific Eastern Steamship Company*, 8 Cal. (2d) 241".

Specification of Error to Be Urged.

The Circuit Court of Appeals erred in not holding in accordance with the prevailing law of California that the sale in question was completed in that State and was subject to the Corporate Securities Act.

Reasons for Granting the Writ.

The prevailing law of California is contrary to the force ascribed by the Circuit Court of Appeals to the decision of the California court in the *Robbins* case. The opinion in that case is 45 pages long and the ground of decision ascribed by the Circuit Court of Appeals to the California court does not appear from the opinion to have been the real basis of the California court's decision. The Corporate Securities Act of California was enacted as a Blue Sky law to protect investors. If all that is necessary in order to emasculate the Act in any and every case to which it was intended to and should apply is to mail the securities sold in California in violation of law across the borders of the state for safekeeping, the Act might as well never have been enacted. Other decisions of California courts, which petitioner claims show that the prevailing view of the California courts is to support and

not annihilate the Corporate Securities Act of that State, are set forth in petitioner's appended brief in support of this petition. The effectiveness of the Act is of public importance and this Court has often granted certiorari to review decisions of circuit courts of appeals which appear to be in conflict with applicable state court decisions. *City Company of New York, Inc.* v. *Stern,* 312 U. S. 666; *Chase Securities Corp.* v. *Vogel,* 312 U. S. 666; *Vanderbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538; *West, et al.* v. *American Telephone and Telegraph Co.,* 311 U. S. 223; *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169; *Six Companies* v. *Highway Dist.,* 311 U. S. 180.

WHEREFORE, your Petitioner respectfully requests that a writ of certiorari should be granted as prayed.

Dated: September 25, 1942.

S. T. PERSEN
Ancillary Administrator de bonis non with the will annexed of Washington Gray, deceased,
Petitioner.

by WILBER W. CHAMBERS,
Counsel for Petitioner.

FRANK H. TWYEFFORT,
WARREN C. DUBOIS,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

References to the opinions of the courts below and the grounds of jurisdiction, as well as a statement of the case and specifications of error to be urged are contained in the petition and will not here be repeated.

POINT I.

The documentary evidence shows that the sale was completed in California.

The "sale order" (R. 102) indicates the sale was to Washington Gray in Los Angeles. The notice of confirmation of sale (R. 104) was sent to Washington Gray in California from California and says: "* * * we are pleased to confirm sale to you * * * Disposition will be made in accordance with your instructions". The purchaser's letter enclosing payment in full (R. 105) directs the issuance of certificates of stock and their delivery "to *your New York office* for my account for safe keeping" (emphasis supplied). This letter was sent from California to "National City Company" in California. The form supplied by seller (R. 106) for filling in by buyer had a space to be filled in after the words "When the certificates are ready kindly forward to" and this space was filled in by Washington Gray to read: "National City Company (*Head Office*) New York City, for safe keeping & subject to my order" (emphasis supplied). Purchaser was a resident of Minnesota (R. 105, 106). He had a safekeeping account with The National City Company of New York (R. 220). The seller in transmitting

the certificates bought by buyer to its New York office for safekeeping acted as the agent of the buyer and the effect was the same as if the certificates had been delivered to buyer in California and forwarded by buyer himself to New York for safekeeping.

POINT II.

The decision in *Robbins* v. *Pacific Eastern Corporation*, 8 Cal. (2) 241, solely relied on by the Circuit Court of Appeals for its reversal of the verdict in Petitioner's favor is not authority for the reversal.

In the *Robbins* case there was no sale but an exchange of securities; the facts demonstrating the identity of the principal (the New York company, here) with the agent (the California company, here) were not present in the *Robbins* case; and there was there no completion of a sale by payment in that case (because there was only an exchange) as there was in this. The court in that case stated that the voluminous papers "indicate that the parties intended title to pass only upon such delivery" of the exchanged stock in New York, whereas here it was obviously intended that title would pass upon payment in California and anything done thereafter was purely in relation to safekeeping of the subject matter of the sale. A reading of the 45 pages of the opinion in the *Robbins* case discloses that any phraseology in the course of the long opinion which might indicate that a sale such as that here involved was consummated outside California, is dictum.

POINT III.

The sound and prevailing decisions of the California courts are to the effect that a sale such as that in the case at bar should be held to have been completed in California in order to prevent easy avoidance of the Corporate Securities Act of that State.

Without regard to the Corporate Securities Act of California there can be no doubt, from the following decisions of the California courts, that a sale of stock is completed upon the acceptance of an offer to sell.

In 18 Corpus Juris Secundum, under the title "Corporations", Sections 409 and 410 (a), it is said in part:

> "Where, however, the title to personal property sold or exchanged passes whenever the parties agree on a personal transfer and the article is identified, it is not essential to a valid sale of corporate stock that the stock certificates be delivered simultaneously with the payment of the purchase price" (citing *Mason* v. *Lievre*, 145 Cal. 514—1914).
>
> "The ownership of shares of stock passes from the seller to the buyer by force of the contract of sale, and not by operation of law, and, where the contract of sale is executed, the property in the shares sold, in the absence of fraud, passes, as between the seller and purchaser, to the purchaser" (citing *Schaefer* v. *United Bank & Trust Co. of California*, 104 Cal. App. 635 (1930), and *Lewin* v. *Hanford*, 169 P. 242, 35 Cal. App. 30), "although the certificates remain in the seller's possession" (citing *Cortelyou* v. *Imperial Land Co.*, 156 Cal. 373—1904).

In *Young* v. *New Pedrara Onyx Co.*, 48 Cal. App. 1, the facts were that one Blockman orally offered to sell and

deliver to a California company the entire capital stock of a Mexican company (100 shares) and receive in exchange the entire capital stock of the California company—100,000 shares. This offer was accepted. Thereupon Blockman offered the California company the option to repurchase all of its stock for $160,000, which was accepted. On July 7, 1906, Blockman signed and delivered to the California company a confirmation of his original offer of exchange of stock of the Mexican company for stock of the California company, with a paragraph about the optional right of repurchase, etc. Certificates for all the California company's shares were made out in Blockman's name but remained in the manual possession of the company. The court said in part:

> "Shares of stock are personal property, and there is no reason why, *as between the parties*, they cannot be transferred as any other personal property. * * * A share of stock being an incorporeal right, incapable of manual delivery, and the certificate being nothing more than evidence of its existence, it is obvious that, in the absence of any controlling statutory inhibition, the shares, without an assignment or delivery of the certificate, may be assigned in any manner appropriate to the transfer of incorporeal personal property, as, for example, by a bill of sale, or any mode that will suffice to pass title to a chose in action or intangible property. The *jus disponendi* in shares of stock is an incident of ownership and may be exercised in any manner not prohibited by law (citations). * * * the mode adopted by the California company and Blockman on July 3, 1906, confirmed by Blockman's written instrument of July 7, 1906, was sufficient, as between the parties thereto, to transfer to the California company whatever title Blockman may then have had in the 100 shares, or any of them."

The facts in *Crocker* v. *Crocker*, 84 Cal. App. 114 (1927), were that stock stood in the name of a partnership which was dissolved. The uncontradicted testimony of one of the two partners was that the stock in question on dissolution was to be his. It was pledged with a bank for a partnership loan. The court said in part:

> "The point is made by the plaintiff that the purported transfer of the stock by Crocker Brothers to Warren Crocker was invalid because the stock was not formally assigned to the latter. The point is not maintainable as between the parties themselves—that is, as between the transferor and transferee—a transfer of shares of stock of a corporation may be effected by any of the several modes whereby personal property of a different species may be transferred. * * *"

In *Schaefer* v. *United Bank & Trust Co.*, 104 Cal. App. 635 (1930), the facts were that Schaefer signed an assignment of his stock in a corporation which was represented by a receipt therefor by an institution holding it in connection with a merger of that company and another into a new company and the receipt so endorsed or assigned was sent to another bank with a draft on the purchaser for delivery against honor of the draft. It was disputed whether Schaefer signed the draft. Schaefer sued to get back his stock and any stock in the new company to which it entitled him. The court said in part:

> "Appellant" (Schaefer) "contends that the evidence does not support the finding that there was a sale of the stock. * * * Appellant, having made a sale of his stock and the purchase price having been paid to his agent, it appears to the court that the fact that he did not sign the aforesaid draft * * * did not in anywise affect the validity of said sale. * * *"

In *Cortelyou* v. *Imperial Land Co.*, 156 Cal. 373 (1909), the facts were that plaintiff bought from defendant shares

of its stock which stood in the name of Ferguson, its general manager, and paid the agreed price, it being agreed it should be held by a voting trustee, a copy of the certificates of stock with the pooling agreement endorsed thereon to be delivered to plaintiff. No such certificates were issued and the stock continued in the name in which it stood when plaintiff bought. The court said in part:

> "* * * Cortelyou" (plaintiff) "with knowledge of the fact that the stock was thus issued, bought the same and consented that it should be evidenced by the certificates thus in the hands of Ferguson. The shares, as distinct from the evidences of ownership, were by such purchase vested completely in Cortelyou, and he became thereafter a shareholder to the extent of his purchase, and, under his agreement, entitled to have transferred to him the evidences of ownership. Ferguson did not hold the property of Cortelyou after the sale; that property, which was the shares and personal property, passed with the purchase and payment of money."

Head-note No. 1 in *Mason* v. *Lievre*, 145 Cal. 514 (1904), said:

> "An action may be maintained for the purchase price of certain shares of the stock of a corporation sold by plaintiff to the defendant, where it appears that, as the result of correspondence, there was a complete offer and acceptance for the purchase and sale thereof, with direction to the plaintiff to draw upon the defendant for the purchase money, without direction as to delivery, and that the plaintiff complied with such direction and set apart the stock for the use of the defendant, and requested information as to the mode of its issuance, and tendered the stock thereafter within a reasonable time. In such case

there was a completed sale of the stock, as to which an immediate delivery was not essential."

In its opinion the court said in part:

"Mr. Cook states the law thus: 'Generally a sale of stock is attended with an immediate delivery of the certificate therefor, or it is agreed that the certificate shall be delivered at some specified time in the future. If, however, the vendor offers to sell his stock and the vendee accepts the offer, the contract is complete and binds both parties, although nothing has been said as to the time when the certificate of stock shall be delivered. The law implies that the contract will be performed by a delivery of the certificates immediately or within a reasonable time and either party may insist upon carrying out the contract.' (Cook on Stock and Stockholders, sec. 334) * * * The rule of our code is, that 'The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not.' (Civil Code, sec. 1140). If title passes in such a case, it cannot be that delivery of the thing, simultaneously with payment, is necessarily of the essence of the transfer. * * *"

In the case at bar, not only was the stock paid for in California by the purchaser, but, in giving the seller a written order in California as to the disposition of the certificates, he executed a constructive, if not an actual, receipt for the said shares. But even assuming, *arguendo*, that the *Robbins* case has some applicability, there is grave doubt as to the soundness of that decision, as appears from the following comment in 26 Cal. Law Review, at page 266:

"There are no prior California cases squarely in point upon this subject * * * the principal decision

cannot stand unquestioned in view of the policy behind the act, *i. e.* to protect the buyer even to the extent of making shares issued in violation of the act void rather than voidable * * * what is left of that portion of the California Securities Act which states that no offers or negotiations to sell shall be made without a permit or the shares so issued shall be void. * * * The Court gave no effect to that part of the Act applying to offers and negotiations for a sale."

POINT IV.

The public policy of the State of California as enunciated by its Legislature in enacting the Corporate Securities Act should not be nullified by a strained reliance by the court on a highly technical point constituting the only ground given in support of the reversal in this case, viz. that a transaction otherwise constituting a California sale subject to its Corporate Securities Act is taken out of the protection of that Act by a direction by the buyer to the seller to send the property bought to the seller's office in another state for buyer's safekeeping account there.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Dated: New York, September 25, 1942.

WILBER W. CHAMBERS,
Counsel for Petitioner.

FRANK H. TWYEFFORT,
WARREN C. DUBOIS,
Of Counsel.

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the District Court is not reported. It is in the Record (225-233).*

The opinion of the Circuit Court of Appeals reversing the decision of the District Court and directing the dismissal of the complaint, is reported in 129 Fed. (2d) 326. It reads:

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* Figures in parenthesis refer, unless otherwise noted, to pages of the record.

"*Per Curiam:* Reversed on authority of *Robbins* v. *Pacific Eastern Steamship Company,* 8 Cal. (2d) 241, and complaint dismissed." (247)

Ground for Invocation of Writ.

The ground upon which the writ is sought to be invoked is that the Circuit Court of Appeals has decided important local law (of California) in a way probably in conflict with applicable local (California) decisions.

The Questions.

The alleged cause of action involved, and was based wholly upon, an alleged violation of the California Corporate Securities Act in the sale, under a contract entered into in California, of certain securities for which no California permit had been obtained but which were validly issued and delivered to the purchaser in New York pursuant to the contract.

The District Court held that the securities were void because no California permit had been obtained; and that petitioner was entited to recover the purchase price.

In reversing and directing judgment for respondent on the authority of the *Robbins* case, the Circuit Court of Appeals merely held that the sale, allegedly made by respondent, was not in violation of the California Act, within the meaning of that Act as construed by the highest court of California; that the securities validly issued in New York were valid and were not rendered void by the absence of a California permit; and that petitioner was not entitled to recover. That was the question decided in the *Robbins* case, discussed more fully, *infra,* pages 8-11.

There were various other questions, in the nature of defenses, which respondent urged below. However, since

such holding in the *Robbins* case that the security was not void for lack of a California permit, in and of itself alone, disposed of the entire case on its merits, it became, of course, wholly unnecessary for the Circuit Court of Appeals to pass, expressly, upon any of the other questions.

Thus, the only question here is whether or not the *Robbins* case is applicable.

Reasons Assigned for Granting the Writ.

1. Such factual distinctions exist between this and the *Robbins* case as to make inapplicable the decision in that case.

2. Assuming that the *Robbins* case has "some applicability" it is unsound law and should not prevail, in that, if followed, it would nullify the California statute.

Petitioner suggests that the Circuit Court of Appeals misconstrued the *Robbins* decision, in that any language there used which is seemingly applicable to this case, is only *dictum.*

That suggestion is offered without support of any detailed consideration of the facts in the *Robbins* case and in the teeth of similar constructions of the *Robbins* case by:

(a) the Circuit Court of Appeals for the Ninth Circuit, in *In Re Motor Products Mfg. Corp.* (1937), 90 Fed. (2d) 8, cert. den. 302 U. S. 695; and

(b) a California intermediate court of appeal, *Jones* v. *Re-Mine Oil Co.* (1941), 47 Cal. App. (2d) 832.

The petitioner may not have read those cases but he is in a position, nevertheless, of contending that two Circuit Courts of Appeals (Second and Ninth) and an inter-

mediate California court of appeal have misconstrued the scope of a decision of the Supreme Court of California involving the construction and application of a statute of that state.

It is novel to hear the soundness of a state decision, involving solely the construction of a state statute, questioned in the federal courts, which enforce the state decisions where there is no constitutional question.

It is startling for the federal courts to be told that it is error to follow a state court's construction of its own local statute, on the ground that such a construction might frustrate the local intent.

Statement.

Respondent makes this statement in order to present important facts omitted by petitioner; and to correct inaccuracies in his statement of the case.

The suit is to recover the purchase price of 50 shares of the capital stock of The National City Bank of New York, which carried with them a proportionate beneficial interest in the stock of defendant (a New York corporation) held by trustees under a New York trust. The beneficial interest was evidenced by the endorsement of the trustees on the reverse of the bank stock certificates. The beneficial interests in defendant's stock were so united under the trust agreement that they could be purchased, sold and transferred only with the bank stock and not separately (108). The national bank stock was exempt from the California statute (134). The point raised was that the joinder of the beneficial interests made a California permit necessary. No permit had been obtained.

The purchase contract was entered into at Los Angeles in May 1929, eleven years before this action was begun,

between one Washington Gray (plaintiff's testator)* and The National City Company of California (a California corporation). Respondent assumes here, *arguendo,* that the contract was made on its behalf.** The terms of the contract were all in writing and they are clear and simple (91-92; 102-106). Gray agreed to buy the securities and to accept delivery of them in New York. Defendant agreed to sell; and, under the particular provisions written into the contract by Gray, defendant agreed to cause the certificates to be issued and registered in Gray's name in New York and to be delivered to him in New York "when ready", by delivery to his safe-keeping account at defendant's head office in New York. Before leaving on his trip to California, Gray had established such safe-keeping account with defendant at its head office in New York (219; 220).

The contract was performed and consummated as follows: Gray paid the purchase price by delivery in California of New York drafts (105) on May 14, 1929. Respondent in New York caused the certificates to be issued there, and to be delivered to Gray's safe-keeping account at defendant's head office in New York on May 24 (92).†

The following additional facts, of cardinal importance, although present in the record, are entirely omitted from petitioner's statement and brief. Their omission is sig-

* Gray was a resident of Minnesota, temporarily visiting in California at the time the contract was entered into. He died in Minnesota in May 1938—nine years later and two years before this action was begun (105-6; 220-1; 2).

** Whether or not the California corporation was defendant's *alter ego* or acted as its agent were among the questions not passed on by the C. C. A.

† The certificates remained in Gray's safe-keeping account in N. Y. until October, 1931—for over two years—and were then sent to him in Minn. (95, 123, 219), where they were subsequently sold by his executor in 1938 (8). They appear never to have gone into California.

nificant in that only without them can petitioner attempt to argue against the authority of the *Robbins* case.

a. The certificates representing the securities were executed and issued by the bank (as to its stock) and by the trustees (as to the beneficial interests), respectively, in New York, on May 22, 1929, by transfer from other similar certificates then outstanding in the name of a third party; and they were delivered by the bank to Gray's safekeeping account at defendant's head office in New York on May 24, 1929 (92-93; 108-111).

b. The certificates, both Gray's and the then outstanding certificates from which Gray's were transferred, were in respect of both the bank stock and the beneficial interests, validly issued in New York; and all of them were, when so issued and delivered in New York, valid in all respects under the law of New York (93, 97).

POINT I.

Robbins v. *Pacific Eastern Corp.*, 8 Cal. (2d) 241, is applicable.

The California Statute: Corporate Securities Act (129-151).

Although the Act lies at the foundation of this and the *Robbins* case, petitioner neither quotes therefrom nor sets it out as required by Rule 27. Its relevant parts are:

> "Sec. 3. No company shall sell . . . or offer for sale, negotiate for the sale of or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do . . ." (135)
>
> "Sec. 12. Every security issued by any company, without a permit . . . shall be void, . . ." (141).

The Act requires a permit to be obtained only where the issuer sells or issues in California a non-exempt security of its own issue in a sale upon an original issue. Only the issuer is required to obtain a permit. A person or corporation selling for his or its own account personally owned stock not of his or its own issue need not obtain a permit. The Act is clear and the cases so hold. (*Domestic & Foreign Petroleum Co.* v. *Long,* 4 Cal. (2d) 547, *People* v. *Craven,* 219 Cal. 522, *People* v. *Pace,* 73 Cal. App. 548.)

The Act is not—as erroneously suggested by petitioner—a "registration" type of "blue-sky" law, but a specific permit type. In this respect it differs radically from blue-sky laws which require registration of the security by whosoever proposes to sell it, whether issuer, dealer or other person. (Dalton, *California Corporate Securities Act* (1930), 18 Cal. L. Rev. 115.)

Nor does the Act require a permit for resales in California in the secondary market of validly issued and already outstanding securities, whether issued originally in California (*Robbins* case, 8 Cal. (2d) 241, at 269-70), or outside the state (*Rhoades* v. *Townsend,* 139 Cal. App. 121, 33 Pac. (2d) 860). Resales in the secondary market of outstanding securities are regulated only by the licensing and regulating of brokers and dealers (399; Sec. 211). The negotiations for, or the making of a contract in California without a permit may be a violation of the penal provisions of the Act (141; Sec. 13), but if the security is validly issued in another state, in good faith and not for the purpose of evasion of the law it is not void in California.* Thus, disregarding all other possible de-

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* Such is the essence and the express holding in *Robbins* v. *Pac. Eastern,* 8 Cal. (2d) 241.

See also, *in re Motors Products Corp.,* 90 Fed. (2d) 8, cert. denied 302 U. S. 695, discussed more fully *infra,* pages 17-18.

fenses, the vendee's right to recovery in this case, as in the *Robbins* case, depends entirely upon whether the security is void in California under Sec. 3 of the Act.

The *Robbins* Case.

In July, 1929, defendant (a Delaware corporation referred to in the opinion as the "Trading Corporation"), which had its principal business office in New York but no office nor place of business in California, made a written offer to American Co. (a California corporation) in California, to exchange shares of its stock for not less than 51% of the stock of American Co. The offer specified an acceptance date and a date one month later for the consummation of the exchange; but it did not specify the place where the exchange was to be made.

Before the acceptance date and pursuant to the offer, stockholders of American Co. owning upwards of 51% deposited their certificates in escrow with American Trust Co. (a California subsidiary of American Co.) in San Francisco, with the customary assignments, selling, assigning and transferring the stock to defendant, and an authorization to the trust company to execute the exchange. Each depositing stockholder received a "deposit receipt" from the trust company wherein it agreed to hold and exchange pursuant to the offer.

The exchange was consummated as follows: The deposited stock was brought to New York by a representative of the trust company. To save New York stock transfer taxes, the deposited stock was taken to Jersey City by the trust company representative and was there delivered by him to a representative of defendant. Meanwhile, the stock of defendant necessary for the exchange had been issued by it in New York in the names of the various depositing American Co. stockholders. Im-

mediately upon delivery in Jersey City of the deposited stock to defendant's representative, it delivered its stock in New York City to the trust company representative there, who thereupon sent defendant's stock by mail to the trust company in San Francisco. After receiving defendant's stock in San Francisco, the trust company there delivered it to the respective depositing American Co. stockholders (including plaintiff), in California, against surrender of the deposit receipts.

Some time later and after material depreciation in value of the securities, plaintiff brought his suit. The basic grounds were that the transaction was in violation of the California Corporate Securities Act, and defendant's stock was void because no permit had been obtained under that Act.

The California Supreme Court held, however, that such issue of securities did not violate the Corporate Securities Act, even though the preliminary transactions leading up to the issue occurred in California, for the reason that the securities were issued and delivered in New York, where such issue and delivery was legal. The court said,

> "Even if it be assumed that a contract was entered into in California . . ., that would not necessarily be decisive. . . ." (p. 269)
>
> "As to both the question of place of performance and place of passage of title we are dealing with a question of intention of the parties" (p. 270).
>
> ". . . the trial court found . . . that the Trading Corporation shares were located and had their situs in New York; that New York was the natural place for the delivery of such stock; and that New York had a natural relation to the transaction. This last mentioned finding is of importance. New York was not unrelated to the transaction; the least that can be said is that New York had a normal and rea-

sonable connection with the transaction. New York was not seized upon as a subterfuge to evade the law of California; it was, to say the least, one of the states where delivery reasonably could be made. This has always been considered an important factor by the courts in passing on the validity of contracts.

". . . there is another rule . . . which leads to the same conclusion. It must be assumed, of course, that the parties hereto intended to enter into a legal and binding contract. Neither of the contracting parties was deliberately intending to mislead or defraud the other . . . none of the plaintiffs gave any thought or consideration to the existence or nonexistence of a permit; in other words, they intended and hoped by this transaction to enter into a valid contract of exchange. * * * Certainly the New York delivery construction is equally reasonable with the California delivery construction. * * *

"It is no answer to point out . . . the strong public policy behind the Corporate Securities Act" (pp. 272-273).

". . . At most, interpreting the transaction most favorably to appellants, we have a situation where a foreign corporation makes, in California, an offer to sell its stock, delivery and passage of title to take place in a state reasonably connected with the transaction—New York; this offer we will assume was accepted in California. The validity of the stock when so issued, in our opinion, was not affected even if the prior contract to sell it was illegal.

"As already indicated, even if it be assumed that the Corporate Securities Act did apply to the negotiations had in this state, and even if it be assumed that the executory contract, so far as the seller—the Trading Corporation—is concerned, was illegal, nevertheless, the performance and execution of the contract in New York, being legal there, and being complete in themselves, stand independently of the prior illegality." (p. 277)

"Appellants' argument would visit upon the Trading Corporation a species of judicial outlawry; it would lead to the conclusion that whenever a foreign corporation desired to sell some of its stock to California residents, and, in California, through one of its representatives, entered into negotiations looking toward such object, assuming such negotiations to be illegal, it never could legally complete the deal either in this state after it secured a permit, or elsewhere without one. * * * it does not impair the validity of a sale when made that the prior contract to make it was illegal. This is so because the sale or executed contract may legally stand on its own feet, independent of the prior executory contract" (pp. 278-279).

Petitioner's Arguments in Support of a Ground of Conflict Under Rule 38.

His papers do not show any valid ground for invoking the writ.

His main point seems to be that the *Robbins* case, even if applicable, does not represent the law of California as declared by its Supreme Court, and for that reason the decision here conflicts with other California decisions holding *contra* to the *Robbins* case. However, reading his papers together, and liberally, it may be that he also rests on the proposition that there are features—facts—in the *Robbins* case which distinguish it from this case, and which, if given recognition, would make the *Robbins* case inapplicable, and thus a conflict with other decisions exists. The arguments in attempted distinction will be first considered.

Petitioner argues:

Claimed factual distinctions.

a. The "sale"—which can only be intended to mean the transaction as consummated—was completed in California.

b. The transaction was a "sale" as distinguished from an exchange.

c. The identity of defendant with its agent is clear in this case and not clear in the *Robbins* case.

Taking them in that order:

a. Petitioner contends that by Gray's acceptance of defendant's offer, viz., his letter of May 14, 1929 (105) containing the provisions for registration and delivery to his account in New York, and by his payment in California, the contract was fully performed and fully executed there. To avoid the executory provisions for registration and delivery in New York at a later date, which Gray wrote into the contract, petitioner urges that Gray's letter containing such provisions constituted a constructive "receipt" by him of delivery of the securities in California.

Such argument rests on the proposition that such constructive "receipt" given by him had the legal effect of making defendant, through its agent in California, Gray's agent in California to accept delivery there for him, and, as petitioner suggests, thereafter to transmit the stock back from California to New York.* Such reasoning ignores entirely the facts: (a) that, in response to defendant's offer, Gray completed the terms of the contract by supplying the provisions that the performance was to be consummated by the issuance and delivery to him in New York; (b) that the transaction, the "sale", was performed and consummated in New York by the issuance and delivery there; (c) that both the bank stock and beneficial interests were validly issued and delivered in New York; and, finally, (d) that Gray's stock was not intended to go to California and did not go there. Gray's stock never had a status in California.

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* Petitioner's Brief, pages 7, 8 and 13.

Despite such established and unavoidable facts, and in the face of the *Robbins* decision, the District Court adopted petitioner's contention that Gray's letter furnishing the provision for registration and delivery was "in effect a receipt for the stock" (226) in California, and drew the patently erroneous conclusion that the "sale * * * was a transaction fully consummated in the State of California" (239).

In the *Robbins* case, plaintiff likewise argued: The contract made, in California, was performable there, and was there completed, in the sense of performance, by the deposits operating as payment and as acceptance of a unilateral contract, subject only to the condition subsequent that 51% of the stock be deposited before the date specified.

The California court, in disposing of that argument, stated that the real questions were: Whether the contract was an executed or executory one? Whether title passed upon the deposit of the American Co. certificates regardless of delivery of the defendant's certificates? Whether the contract was performable in New York or in California? It then held (p. 269):

> "Our conclusions on this phase of the case are as follows: At most the transaction in California amounted to an executory contract to buy and sell the Trading Corporation stock; in so far as the Trading Corporation is concerned, this contract was performable in New York; title to the Trading Corporation stock passed in New York."

None of the earlier California cases cited by petitioner related to the Corporate Securities Act. But aside from that, none of them are in conflict with the *Robbins* case on the question of performance.

Moreover, the same question as to passage of title was argued and specifically passed on in the *Robbins* case.

There, the Court, after observing that the question of whether title to stock can pass without physical delivery depends first upon the provisions of the contract for performance of delivery; and, secondly, if the contract is silent, upon the intent of the parties as determined by the court, held (p. 275):

> "It is, of course, true, as urged by appellants, that in all cases physical delivery of the certificates is not necessary to effectuate the transfer of title to shares of stock. (Citing, among others, *Young* v. *New Pedrara Onyx Co.**) * * * It hardly needs citation of authority to state that under some circumstances title to shares of stock may pass without delivery of the certificates. * * * What we are here considering is not what could have been done, but what these parties, as reasonable men and women, intended to do. The authorities are numerous to the effect that the usual and ordinary course of business is that a contract for the sale of shares is executed by the endorsement and delivery of the certificates (citing 6A Cal. Jur., p. 657, and quoting from *National Safe, etc.* v. *Hibbs,* 229 U. S. 391). * * * In the absence of an expressed intent to the contrary we must construe this transaction as one intended by the parties to be consummated in the usual and ordinary manner; that is, title to pass upon delivery of the certificates." (Matter in parenthesis supplied.)

The fact that payment was made by Gray prior to issuance, registration and delivery is immaterial under the *Robbins* decision. Payment was the initial performance by Gray but it did not make the contract any less executory. Defendant was still required to cause the stock to be issued, registered and delivered in New York, and to Gray's satisfaction. Incidentally, as has been observed, payment was by New York drafts.

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* One of the cases relied on by petitioners here (Brief, 9-10).

In the *Motors Products Corporation* case,* the consideration for the securities passed in California.

b. The "sale" vis-a-vis "exchange" point was also disposed of in the *Robbins* case. The Court there said (p. 269):

> "Before setting forth the reasoning supporting these conclusions some reference should be made to the legal nature of an exchange. In law, an exchange is two sales. At the time of the transaction here involved, the Civil Code provided; Section 1804: 'Exchange is a contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only.' Section 1806: 'The provisions of the title on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and of a buyer as to that which he takes.'"

c. On the question of the identity of defendant as the vendor, petitioner argues (Brief, 8) for a distinction from the *Robbins* case, in that, there the Trading Company itself made the offer and entered into the contract in California, whereas here the defendant acted in California through its agent or *alter ego* in that state. That argument itself eliminates the distinction contended for, and here agency is assumed, ***arguendo.***

POINT II.

Robbins v. *Pacific Eastern Corporation* is controlling.

As pointed out at page 11, *supra,* petitioner's main contention is that even if some of the language of the

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* In *re Motors Products Corporation,* 85 Fed. (2d) 318 (C. C. A. 9th Cir., 1936); 90 Fed. (2d) 8 (1937); cert. denied 302 U. S. 695.

Robbins case seems applicable, it is unsound law, and, if applicable, that decision should not be followed because to do so would nullify the California Act.

For an example, he says that all that would be necessary to emasculate the Act would be to mail across the borders of California securities sold in that state in violation of the Act (Pet., 4), with the suggested implication that in this case the stock was delivered in California and then transmitted back to New York.

It is the question of the effect of planned evasion. To raise it here, ignores again the facts that Gray and not respondent was the party who put into the contract the provision that delivery be made in New York, and that his stock was never intended to go into California and did not go there.

However, petitioner trifles. The *Robbins* case is the latest decision of the highest court of California on this important question.

The court then said (pp. 273-4):

> "It is no answer to point out, as do appellants, the strong public policy behind the Corporate Securities Act. That statute is undoubtedly a salutary law. The same can be said of the usury law, the statutes restricting corporation action, and the many other statutes to which the rule of construction here being discussed has been applied. This rule of interpretation must be applied by the courts, unless a contrary construction is compelled by the terms of the contract. It is peculiarly applicable in the present case where the plaintiffs, and the other stockholders, got exactly what they wanted and what they bargained for—where no fraud or imposition has been proved—and where they are now trying to recoup their losses, by a strained and technical construction of the contract, from what turned out to be a bad bargain."

It would be idle to discuss the proposition that the *Robbins* decision should not control because petitioner regards it as bad law. The fact is that that decision is the ruling case in California upon every point raised, intended to be raised or even suggested by petitioner. No citation of authority is necessary for the point of its controlling force and effect.

Respondent, after exhaustive examination, states that since the decision in the *Robbins* case the pronouncements and rulings there made by the California Supreme Court have not been modified, limited or restricted. It has, however, been expressly followed by the Circuit Court of Appeals, 9th Cir., in *In re Motors Products Corp.,* 90 Fed. (2d) 8, cert. den. 302 U. S. 695; and by the District Court of Appeals in *Jones* v. *Re-Mine Oil Co.,* 47 Cal. App. (2d) 832; 119 Pac. (2d) 219 (1941).

In *Motors Products,* the question involved the validity of securities (debentures) sold by Motors Products (a Missouri corporation) to one Jahns, a resident of California. The preliminary negotiations were had and the contract was entered into in California. The consideration given by Jahns in payment for the securities was a chattel mortgage on a factory situated in Los Angeles which Motors Products purchased. Pursuant to the contract, the securities were issued by Motors Products in Missouri and there delivered to Jahns' representative who thereupon took them to California and there delivered them to Jahns. The securities were validly issued in Missouri but no California permit had been obtained.

In 1936 and before the *Robbins* decision, the Circuit Court of Appeals arrived at the same conclusions (85 Fed. (2d) 318) later reached in the *Robbins* case. Shortly after the *Robbins* decision, that case was called to the attention of the Circuit Court of Appeals by an application for a

rehearing in the *Motors Products* case. The Court adhered to and affirmed its earlier and independent construction; and in denying the rehearing said (90 Fed. (2d), pp. 11-12):

> "In the opinion in this case (C. C. A.) 85 F. (2d) 318, the court held that bonds issued in Missouri, valid by the laws of that state, were enforceable although no permit was obtained from the California corporation commissioner as would have been required if the bonds had been issued in California.
>
> * * * * *
>
> "Since that decision, the Supreme Court of California decided the case of Robbins et al. *v.* Pacific Eastern Corporation et al., 65 P. (2d) 42. It was there held in no uncertain terms that a security transaction in New York, legal there, but which would require a permit if occurring in California, was not void for failure to obtain a California permit, even though the transactions leading up to the issue were held in California."

On petition for certiorari, after the *Robbins* decision, plaintiff in the *Motors Products* case urged, as does petitioner here, that the *Robbins* case is in conflict with other California decisions; and that, if followed, the decision in the *Robbins* case and of the Circuit Court of Appeals would be to nullify the California Act. Petition was denied (*Moore* v. *Jahns*, 302 U. S. 695).

Petitioner cites no decision of any California court, either prior or subsequent, in conflict with the *Robbins* case. There are none. And even in quoting from the case note in 26 Cal. Law Rev. 266, he omits its conclusion reading:

> "* * * Does it leave the door open to evasion of the Act by resorting to another state for actual issue or sale, or would the court invoke the policy of the statute or give literal effect to the words of the

statute, in case of a flagrant evasion? The principal case has left the question open by a finding that the the State of New York was not used for the purpose of evading the Act but rather as a normal place to effect a binding transaction because of the presence of the issuing corporation in that state. * * * Consequently, the principal case does not open such an easy avenue of evasion as one might suppose upon first glance."

———o———

The facts in the instant case even more strongly compel the application of the rule of the *Robbins* case than do the facts in that case itself. In the first place, the *Robbins* case clearly involved a sale of securities upon an original issue. In the instant case, for aught that appears, the Circuit Court of Appeals may have accepted defendant's contention below that the securities were merely resold in a secondary market transaction and no original issue was involved.* In the second place, in the *Robbins* case, the buyers were residents of California; and although delivery was made outside of California, the certificates evidencing the securities were almost immediately thereafter physically forwarded to the purchasers in California. On the other hand, in the instant case, the buyer was never a resident of California and, although the executory contract was entered into in California while he was temporarily sojourning there, the executory contract itself expressly provided for delivery in New York. The certificates were actually delivered in New York, where valid, and the certificates were never physically present in Cali-

* The California Supreme Court, in the *Robbins* case, reaffirmed the California rule that no permit was required under the Corporate Securities Act in the case of a sale in a secondary market of securities already validly outstanding, 8 Cal. (2d) 241, at 269-70.

fornia. Moreover, The National City Bank of New York, the defendant (a New York corporation), and the trustees of a New York trust who executed the endorsement—constituting the only possible issuers of the securities involved—all had their principal places of business in the City of New York. Thus, the securities evidenced by Gray's certificates could never have had a *status* in California.

To paraphrase the language of the California Supreme Court in the *Robbins* case: Gray got exactly what he wanted and what he bargained for—a valid security.

CONCLUSION

The Petition for Certiorari Should Be Denied.

Respectfully submitted,

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